



EUROPEAN COMMISSION

Brussels, 19/12/2012

C(2012) 9457 final

PUBLIC VERSION
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Subject: State aid No SA.33167 – Germany –
Proposed alternative method for the valuation of agriculture and
forestry land in Germany sold by the public agency BVVG

Sehr geehrter Herr Bundesminister,

I. Procedure

- (1) On 10 June 2011, Germany pre-notified a valuation method devised by the public agency *Bodenverwertungs- und –verwaltungs GmbH* ("BVVG"), charged with the privatisation of agriculture and forestry land in the new *Bundesländer* in Eastern Germany, to establish the market value of such land sold by this agency.
- (2) By letter dated 10 July 2011, the German authorities provided further information and submitted a series of national court judgments concerning such

Seiner Exzellenz Herrn Dr. Guido WESTERWELLE
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

Commission européenne, B-1049 Bruxelles – Belgique
Europese Commissie, B-1049 Brussel – België
Telefon: 00 32 (0) 2 299.11.11

a sale of land which held, *inter alia*, that in case of doubt regarding the market value established by the BVVG, the purchaser of the land may insist on an expert valuation¹.

- (3) On 13 October 2011, the Commission services submitted a request for information to the German authorities, to which the latter replied by letter of 18 November 2011.
- (4) A second request for information was sent by the Commission to the German authorities on 30 March 2012, to which a reply was received on 27 April 2012.
- (5) As a follow-up to the second request for information, the German authorities provided, by letter of 3 July 2012, an independent expert opinion on the valuation method devised by BVVG.
- (6) On 28 September 2012, the German authorities notified the valuation method.
- (7) On 8 November 2012, the examination into the notified method was suspended until 28 November 2012, as agreed with Germany.
- (8) By letter of 23 November 2012, Germany provided additional information on the valuation method to the Commission and committed to refrain from applying the method where it results in a price below market value.

II. Description of the method

A. Background

- (9) After the reunification of Germany, BVVG was charged with the privatisation of agricultural and forestry land in the new *Bundesländer* in Eastern Germany². To determine the price at which this land is sold, BVVG devised a reference price system called *Vergleichspreissystem* or 'VPS' (hereinafter: "the VPS method").
- (10) Between 1 July 1992 and 30 June 2010, BVVG sold land totalling 255 000 hectares. In addition, 389 000 hectares were returned to previous owners and leaseholders under the provisions of the *Entschädigungs- und Ausgleichsleistungsgesetz* ("EALG"), the latter covered by the authorised aid scheme N 506/1999³. This scheme expired on 31 December 2009 and was not prolonged.
- (11) BVVG still has roughly 370 000 hectares of agricultural land and about 75 000 hectares of forestry land in its possession. BVVG envisages selling all the remaining land it holds before 2025.

¹ Case Reichenbach v. BVVG. Judgements of (1) Landgericht Berlin, 27.10.2009, (2) Kammergericht Berlin, 26.8.2010 and (3) Bundesgerichtshof, 28.4.2011 (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=25e2cda1dfe75474e3a1dae265c6d502&nr=56512&pos=1&anz=2>).

² Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen.

³ OJ C 46, 19.2.2000, p. 2.

- (12) When selling a plot of land, BVVG has broadly three options available to it:
- 1: A sale to the highest bidder after a public tender;
 - 2: A direct sale to the present leaseholder at market value⁴;
 - 3: A sale at preferential conditions on the basis of the EALG to:
 - a) the former owner of the land expropriated between 1945 and 1949, which is a form of indemnification;
 - b) leaseholders, with a reduction of 35 % on the market value of the land; this option expired in 2009.
- (13) It is in relation to sales concluded between BVVG and current leaseholders under options 2 and 3b that the VPS method is employed⁵.
- (14) The German authorities have informed the Commission of national court proceedings in a particular case between an acquirer of land under the privatisation plan and BVVG, in which the buyer contested the market price which BVVG established via the VPS method. According to the buyer, the market value of the land should be determined by a valuation prepared by an independent expert, while BVVG submits that the VPS method constitutes an alternative and suitable valuation method for the land.
- (15) The judgments resulting from these national court proceedings made reference to the relevant provisions of national law according to which an independent expert valuation is the most suitable means to establish the market price of land⁶. They also refer to the Commission's Communication on State aid elements in sales of land and buildings by public authorities ('Land sale communication')⁷ with respect to the principles outlined in point II.2 thereof, which describes the sale of land on the basis of an independent expert valuation as one of the possible principles to apply. The Federal Supreme Court, at last instance, concluded for the purpose of the case before it that if doubt arises as regards the valuation of a plot of land made by BVVG the acquirer of that land may insist on a valuation report prepared by an independent expert. It further noted that that expert is allowed to include, in the sample of comparable transactions, all relevant land sale transactions, as long as transactions are

⁴ Limited to 450 hectares per leaseholder. Under this option, a total size of 135 000 hectares and roughly 2800 leaseholders are concerned.

⁵ The German authorities submit that land sales under option 3b have also come to an end. However, disputes arising from previous land sale transactions with respect to the correct market price are pending and the application of the VPS method, i.e. to confirm the value of the land as established by the VPS method, may still be of relevance for these cases.

⁶ Allgemeine Grundsätze der Immobilienwertermittlungsverordnung or ImmoWertV including the corresponding directives.

⁷ Two principles: sale through an unconditional bidding procedure (chapter II.1) and sale without an unconditional bidding procedure (chapter II.2), the latter which provides for the preparation of an *ex-ante* valuation report prepared by an independent expert.

excluded from that sample which are statistically abnormal. However, the courts did not examine the VPS method and whether it is a suitable way to establish the market price for the land under review.

B. The VPS method

- (16) The main objective of the VPS method is to exclude the presence of State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") in land sales concluded by the BVVG, by ensuring that the land is sold at market price. For a given transaction, the VPS method sets the applicable sales price for the land by comparing relevant data from similar past transactions⁸.
- (17) The VPS database contains data on more than 8 400 sales prices from past sales transactions conducted by the BVVG whenever land was sold via a bidding procedure, more than 6 200 second-best offers and more than 4 000 third-best offers submitted in those bidding procedures. The VPS database also includes data on sales transactions conducted under option 3b) above (sale to a leaseholder with a reduction of 35%) and other sales of agricultural land that were concluded among private parties and in which the market price was established by a member of the committee of valuation experts (*Gutachterausschuss*). BVVG updates the information on sales transactions in the VPS database at least once a month, so as to keep it up-to-date.
- (18) By selecting from the VPS database comparable plots of land which have relevance for a planned sales transaction⁹, the VPS provides an average price which is meant to represent the market price for the plot of land in question. The VPS method is explained in more detail in recitals (28) to (31) below.

C. Position of the German authorities

- (19) The German authorities submit that the VPS method generally leads to higher prices as compared to valuations prepared by local valuation experts. These experts generally rely on information from the *Gutachterausschüsse*, which comprises overall fewer transactions and concerns plots of land of a generally smaller size than those sold by BVVG. Therefore, sales concluded by BVVG at prices determined under the VPS method do not, in any event, lead to the granting of an advantage to the purchaser of the land, so that there cannot be State aid within the meaning of Article 107(1) TFEU.
- (20) Considering that the principles laid down in the Land sale communication are not exhaustive and given the fact that these methods are less suitable for BVVG's land sales transactions, the German authorities contend that the VPS method is an accurate and suitable alternative to establish the market value of

⁸ Criteria taken into account are *inter alia* size, region, situation, quality.

⁹ Main criteria taken into consideration are *inter alia* location (zone includes roughly 20 km radius), temporal reference (+/- 12 months), size, situation of the land plot, intended use, quality of the soil.

land sold by BVVG in its capacity responsible for the privatisation of agricultural and forestry land in the new *Bundesländer* in Eastern Germany¹⁰.

D. Independent expert opinion on the VPS method

- (21) Following a request by the Commission, the German authorities submitted an independent expert opinion¹¹ on the VPS method to clarify whether:
- (i) the VPS method is a generally suitable method to establish the market value of agricultural and forestry land so as to exclude *prima facie* the presence of State aid in transactions where the land value was established by that method;
 - (ii) the VPS method is based on commonly recognised valuation principles applicable in Germany.
- (22) The independent expert opinion concluded that the VPS method is not a *sui generis* method, but rather represents a particular form of the comparative valuation method (*Vergleichswertverfahren*), which provides for a selective choice of especially relevant previous transactions on which to conduct a comparison, also by keeping the VPS database up-to-date with relevant new comparative transactions and qualifying past sales transactions with market indicators. The opinion further noted that the VPS database comprises data on sales where plots of land were large in size¹², whereas sales data collected by the *Gutachterausschüsse*, upon which individual experts most often rely in their valuations, are smaller and thus less comparable. Moreover, the opinion concluded that the VPS method provides information of statistical relevance given the high concordance of reference transactions which can be selected from the database and the up-to-date information from recent transactions reflecting market price developments. Finally, the opinion considered the VPS method in compliance with the relevant provisions of national law and principles for carrying out land valuations.
- (23) Paragraph 5.3 of this opinion outlines a few recommendations to ensure an even better statistical relevance when establishing market values on the basis of comparable transactions. These recommendations can be summarised as follows:
- (i) Since a set of comparable transactions may include sales that have particularly high prices and high bids, the current version of the VPS user manual instructs BVVG to use those data for comparison purposes only if

¹⁰ The German authorities refer to paragraph 68 of the Scott judgment (Case C-290/07 P *Commission v Scott* [2010] ECR I-7763,) and paragraph 34 of Seydaland judgment (Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083) respectively.

¹¹ ‘Gutachten zur Geeignetheit des Vergleichspreissystems (VPS) der Bodenverwertungs- und -verwaltungs GmbH (BVVG) für die Ermittlung des Marktwerts von zu veräußernden landwirtschaftlichen Flächen’ prepared by Prof. Dipl.-Ing. Wolfgang Kleiber, a recognised expert in Germany with respect to *inter alia* methods of land valuations.

¹² More than 20 hectares and up to 450 hectares.

- (a) a comparable transaction with a price at least 20% lower than these sales is also part of the same set and (b) the high bids can be considered normal commercial bids, that is, submitted by different bidders, or are otherwise justified when compared with similar tenders. In such instances, the expert opinion recommends including those data in the set and taking into account all market indicators from those comparable transactions for comparison purposes, so long as those data do not represent exceptional circumstances under which the high prices were concluded or offered;
- (ii) In order to ensure a sufficient match of qualitative characteristics of the land to be sold with previous sales transactions, the VPS user manual instructs BVVG to apply a kind of matrix, in which the criteria "location" and "quality" are grouped in steps (*gestaffelte Referenzräume*). Given that the main parameter for determining the market value of agriculture land is size, the expert opinion recommends using a similar method as regards the size of the plot to be valued, thereby increasing the comparability of the size of the land to be sold with previous sales data.
- (iii) In order to reinforce the evidential value of the highest offers contained in the VPS database, the expert opinion recommends including in the set of comparable transactions second-best and third-best offers made in unconditional bidding procedures, independently from the number of other comparable transactions;
- (iv) In the case of inhomogeneous market situations, the expert opinion recommends including qualified second and third best offers in the set of comparable transactions if they are less than 30 % lower compared to the highest offer;
- (v) The expert opinion further recommends that BVVG discloses its transaction information to independent valuation experts, including information on the second-best and third-best offers, so that they no longer exclusively depend on information from the local *Gutachterausschüsse*.

III. Assessment

- (24) By notifying the VPS method, the German authorities have asked the Commission to take a formal position on whether this method is a suitable means for establishing the market value of agricultural and forestry land sold by BVVG under the privatisation programme, so as to preclude, *prima facie*, the presence of State aid within the meaning of Article 107(1) TFEU in such sales transactions.
- (25) According to settled case-law¹³, the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, such as agriculture or forestry, may constitute State aid, in particular where it is

¹³ Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 34 and Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 68; Case T-244/08 *Konsum Nord ekonomisk förening v Commission* [2011] ECR II-0000, paragraph 61.

not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed.

- (26) The Commission notes, in this regard, that land sale transactions should, in principle, be assessed under the Land sale communication, which provides a set of guidelines for Member States to ensure that the sale of land and buildings by public authorities is free of State aid. The Land sale communication recommends two methods to exclude the presence of State from such a transaction : first, a sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid and, second, an *ex-ante* valuation report prepared by an independent expert. These methods seeks to ensure that the price at which land is sold by public authorities reflect, as far as possible, the market value of that land, so as to rule out that the sale confers an advantage on the purchaser of the land.
- (27) However, as confirmed by the judgment of the Court of Justice of the European Union (“CJEU”) of 16 December 2010 in Case C-239/09, *Seydaland Vereinigte Agrarbetriebe*¹⁴, which concerned various valuation methods previously employed by BVVG for the sale of agricultural land in the new *Bundesländer* in Eastern Germany, while it is clear that the two methods set out in the Land sale communication are likely to provide prices corresponding to actual market values, it cannot be ruled out that other valuation methods may also be applied so long as it is assured that the price actually paid by the purchaser on the basis of those methods reflects, in so far as possible, the market value of that land.
- (28) The VPS method, as proposed by the German authorities and applied by BVVG under the privatisation programme, is based on the principle of the comparative valuation method (*Vergleichswertverfahren*), a method used by independent valuation experts in Germany and laid down in the general valuation standards, *Allgemeine Grundsätze der Immobilienwertermittlungsverordnung* (“ImmoWertV”), applied by the industry¹⁵.
- (29) As explained in recital (17) above, the VPS database contains historical data on a large number of past land sale transactions carried out by BVVG. When BVVG envisages a sale, it compiles a set of comparable transactions from the historical data by:
- restricting the regional selection criteria to a radius of 20 kilometres in relation to the land plot envisaged for sale,
 - taking into account similar transactions from the previous 12 months,

¹⁴ [2010] ECR I-13083, paragraph 39.

¹⁵ Including the corresponding directives. The VPS handbook requires including a minimum of ten comparable transactions for land valuation purposes, whereas the industry standards laid down by ImmoWertV considers the same number of comparable transactions as statistically relevant for such purposes.

- including plots of land of similar quality in terms of usage,
 - including plots of land of similar size.
- (30) If this exercise results in less than ten comparable transactions, which is considered to be the minimum number necessary to ensure the statistical relevance of the results, the selection criteria are widened, *inter alia*, by enlarging the radius to 30 kilometres, by including transactions from the previous 18 to 24 months, and by widening the quality criteria¹⁶.
- (31) Once a statistically relevant set of data is established, the median price of that set is calculated¹⁷, without the application of further weighting factors.
- (32) In order to ensure the historical data is up-to-date, the VPS database is continuously refreshed with new transactions and other market indicators, usually once a month and sometimes within the same month as a calculation is needed¹⁸.
- (33) Finally, the German authorities have confirmed that BVVG has since adopted the recommendations proposed by the independent expert opinion, summarised in recital (23) above. The implementation of these recommendations further improves the likelihood of arriving at a market price by ensuring a higher statistical relevance of the selected transactions.
- (34) As regards recommendation (v), the sharing of information from the VPS database with independent valuation experts will increase overall transparency in land sale transactions for these kinds of land sales.
- (35) In light of the above, the Commission considers that the application of the VPS method by BVVG under the privatisation programme for agricultural and forestry land in the new *Bundesländer* in Eastern Germany ensures that the price actually paid by the purchaser reflects, in so far as possible, the market value of that land so that no advantage is conferred upon that purchaser as a result of the transaction, thereby precluding the presence of State aid within the meaning of Article 107(1) TFEU.
- (36) However, since it cannot be definitively ruled out that, in certain cases, the VPS method may lead to a result below market value, the German authorities commit, pursuant to the obligation on all the organs of the State including the national courts and administrative authorities to set aside a rule of national law

¹⁶ Premiums or reductions on past transactions are made to bring them closer in weighting i.e. more comparable to the envisaged sale of land.

¹⁷ Second-best and third-best offers are also included to calculate the median, as long as those are considered to be qualified offers.

¹⁸ As such, the VPS database provides more up-to-date estimates than the *Gutachterausschüsse*, which typically only publishes information on sales transactions every quarter or every six months.

which is contrary to EU law¹⁹, that the BVVG shall refrain from applying this method in any such cases.

IV. Conclusion

The Commission has accordingly decided:

- that the application of the VPS method for the valuation of agriculture and forestry land in Germany sold by BVVG, insofar as it reflects the market value of the land sold, does not confer an advantage on the purchaser of that land and thus precludes the presence of State aid within the meaning of Article 107(1) TFEU in such transactions. Given the scope of the VPS database, this conclusion is limited to sales concluded solely by the BVVG in its responsibility for the privatisation of agricultural and forestry land in the new *Bundesländer* in Eastern Germany.

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European Commission
Directorate-General Competition
State aid registry
J-70 3/225
B - 1049 Brussels
Fax: +32 229-61242

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president

¹⁹ Case C-239/09 *Seydaland Vereinigte Agrarbetriebe* [2010] ECR I-13083, paragraph 52.